UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIJAH DuBOSE, Appellant, vs. MATSON NAVIGATION COMPANY, a corporation, Appellee.	No. 22074

APPELLANT'S REPLY BRIEF

DARWIN, ROSENTHAL & LEFF
KENNETH W. ROSENTHAL, ESQ.

68 Post Street
San Francisco, California 94104
Telephone: GArfield 1-2624

Attorneys for Appellant

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PRELIMINARY STATEMENT

The jurisdictional statement, specification of errors relied upon, and statement of the case are to be found in appellant's opening brief dated October 24, 1967.[1/]

ARGUMENT

I

THE TRIAL COURT FOUND THE CRAMPED WORKING CONDITIONS OF THE GALLEY TO BE THE UNSEAWORTHINESS OF THE SS MATSONIA

Appellee, in its brief at page 8, states:

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1. Appellee does not (and could not) challenge that this Court is in as good a position as the lower Court to evaluate the testimony crucial to this appeal as argued in appellant's opening brief, pages 8-9.

"Appellee was found negligent, and the vessel was unseaworthy, solely because its officers failed to discover that appellant was being bumped and failed to reroute the scullions working as dishrunners (Finding of Fact 7; C.T. p. 78, lines 19-23)."
(Emphasis added)

Appellee has, no doubt inadvertently, not stated the full finding of the Court. The Court's judgment rendered upon submission of the case showed:

"Now, on the question of liability: A narrow passage such as here, whether five feet or four and a half feet wide, probably justifies a finding of unseaworthiness.

"I think it was curable not by reconstructing the entire ship--perhaps that might have cured it--or rearranging that area, but curable by rerouting the dish-runners, or whatever you call them--rerouting the way they go.

"This man had to get the silver cleaned at the place assigned to him. Taking into account the motion of the sea, the confined quarters there and the dimensions of the racks, and so on and so forth, it was almost tailor-made that the racks carried by the dish-runners would bump him, probably on the outside of his right knee, as they were carrying the racks to the galley. It could have been almost a built-in condition for that, it seems to me." (TR 115, L.25 - TR 116, L.14)

The working conditions, and particularly the confined quarters, accounted for the Court's finding of defendant's liability. Mr. DuBose, as the Court pointed out, had to get the silver cleaned under the conditions and at the place assigned to him. Unless he had knowledge

that the working conditions assigned him were dangerous and were causing him serious injury, he cannot be held to be contributorily negligent merely because he remained on the job.

II

APPELLANT WAS UNAWARE THAT THE BUMPINGS WHICH HE CONSIDERED TO BE "LIKE WALKING ALONG AND BUMP YOUR HAND . . . AND YOU JUST IGNORE IT" WOULD LEAD TO SERIOUS INJURY

Appellee, in its brief (page 5) contends that appellant was under a duty "to cease working in an area that he knew was causing him repeated injuries." Whatever the duty may have been if plaintiff knew the bumpings were causing injury, it does not apply in this case because, in fact, the plaintiff did not know he was being injured. A reading of the transcript makes it amply clear that appellant considered the repeated bumpings over a period of time (TR 28, L.4-6) nothing more than mere annoyances, and never considered them to be dangerous or repeated injuries:

> "Q. You never reported any of this incident of bumping or having to work in this space or anything to anyone, did you?
>
> "A. No sir, because I didn't take them to be anything serious." (TR 54, L.22 - TR 55, L.1)
>
> "Q. In fact, that procedure was, whenever any accident actually occurred or any incident

of hard bumps or things like that, you were to report them, weren't you?

"A. Things of that sort, no. You don't report things of that sort because it just like you might be walking along and bump your hand and it might hurt for a minute and you just ignore it." (TR 55, L.8-14)

"Q. Did you realize the seriousness of what was happening when you got these bumps in the back of your leg?

"A. No, I didn't.

"Q. When was it you first realized what was happening, what had happened?

"A. Well, after I had had the operation, then I realized--when I had to have the operation I knew what the doctor told me, it was a minor operation; after I had the operation and I had this trouble and I took this therapy, well, it began to get better, I thought it would improve more." (TR 105, L.6-15)

Appellee cites Misurella v. Isthmian Lines, Inc. (S.D.N.Y., 1964) 215 F.Supp. 857, affirmed (2nd Cir., 1964) 328 F.2d 40. Misurella, a longshoreman, was not only aware that there was no ventilation in the #3 hold in which he was working, but became dizzy as he was working. While his co-workers were getting out of the hold to get fresh air, he remained working, getting dizzier and more ill until he finally collapsed. In contrast, at no time was appellant even aware of the seriousness of the bumpings on the back of his legs. Nor was there any reason for him to anticipate that the repeated bumpings

would ultimately cause him serious injuries. How can the plaintiff be held contributorily negligent for not reacting to an injury he was not aware of?

III

MERE KNOWLEDGE BY APPELLANT OF AN UNSEAWORTHY CONDITION, IN THE ABSENCE OF AN ALTERNATIVE, IS NOT CONTRIBUTORY NEGLIGENCE

The Court below observed: "This man had to get the silver cleaned at the place assigned to him." (TR 116, L.7-8) Appellant had no alternate choice as to where to do his work--he had to work in an area which was cramped and confined.[2/] As the Court said in Smith v. United States (4th Cir., 1964) 336 F.2d 165, at page 168,

> "Had an alternative safe route been available to Smith, his deliberate choice of a course known to be unsafe could possibly have indicated contributory fault. But mere knowledge of the unseaworthy condition and use of the ladder in the absence of a showing that there was an alternative, is not contributory negligence." (Emphasis added)

It is only where the worker has a choice, and chooses carelessly, that he may be found contributorily negligent.

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2. Appellant, in answer to a question why he made no complaint to the ship's officers, said:

> "Well, because we both had to be working there and we had--I had to stand there and do my work, and they had to be passing by. There was no other way for them to get by to do their work." (TR 31, L.2-5)

are applicable herein. Contrary to appellee's suggestion, the law is clear that a seaman in the performance of his duties is not deemed to assume the risk of unseaworthy appliances, Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944). The U. S. Supreme Court said in Tiller v. Atlantic Coast Line Ry Co., 318 U.S. 54 (1943), at page 58:

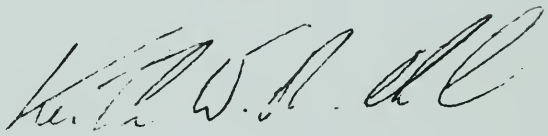
> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment . . ."

Under the F.E.L.A., even though the employee may know that his employer has been negligent in the furnishing of an unsafe place to work, he does not assume the risk of such danger, Williams v. Atlantic Coast Line Ry Co. (5th Cir., 1951) 190 F.2d 744; Heiselmoyer v. Pennsylvania Ry Co. (3rd Cir., 1957) 243 F.2d 773. Seamen and longshoremen do not assume risks which cause injury where the risk is not open and apparent, Klimaszewski v. Pacific Atlantic Steamship Co. (3rd Cir., 1957) 246 F.2d 875, at 877. Appellant DuBose did not assume the risk of his cramped working conditions. Neither can he be charged with contributory negligence for staying on the job, since he reasonably did not know the seriousness or consequences of the repeated bumpings, Kulukundis v. Strand (9th Cir., 1953) 202 F.2d 708.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with these rules.

Dated: December 8, 1967
San Francisco, California



KENNETH W. ROSENTHAL